No. 46869-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Oleson,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00266-0

The Honorable Judge Kevin Hull

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Susan Christopher was a drug dealer. She sold methamphetamine to confidential informants multiple times. RP[1] 10. Police obtained a search warrant, and searched her home. RP 219-224.

The police found three people at the house: Christopher, her boyfriend and occasional housemate Brian Oleson,[2] and a third person named Zak Camacho.[3] RP 219-224, 356, 481-490.

Inside the house, police found drugs and paraphernalia. RP 131-134, 183-185, 267, 278-283. In the master bedroom, they found a rifle leaning on clothing and a pistol inside a fanny pack on top of a suitcase. RP 178, 186-192. The room also held a safe, in which police found a scale, another gun, and paperwork belonging to Christopher.[4] RP 230.

The state charged Mr. Oleson with three counts[5] of second-degree unlawful possession of a firearm and one count of possession of

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[1] The transcripts from pretrial hearings and the trial itself are sequentially numbered, and will be cited as RP. The sentencing hearings are separately numbered, and are cited RP (Sentencing).

[2] The two were also in the process of obtaining a license to run a salvage operation together. RP 256.

[3] None of the officers who testified at trial knew where in the house Mr. Oleson was located when they arrived. RP 235, 311.

[4] Mr. Oleson didn't know the combination to the safe. The safe did not contain anything bearing Mr. Oleson's name. RP 229-230, 236. Mr. Oleson was later acquitted of possessing the gun found in the safe. CP 72-73.

[5] As noted, Mr. Oleson was acquitted of one firearm charge. CP 72-73.

methamphetamine. CP 42. Using identical language for each UPF charge, the Information alleged (in triplicate) that "On or about December 31, 2013... the above-named Defendant did knowingly own, possess, or have in his or her control a firearm, after having been previously convicted of assault third degree..." CP 42-44.

At trial, the evidence showed that Mr. Oleson did not have actual possession of any firearms, drugs, or paraphernalia when police took him into custody. Nor did the state produce any evidence that Mr. Oleson was near any of the firearms, the drugs, or the paraphernalia at the time of his arrest. RP 235, 311.

One of the guns was registered to a woman who lived in Silverdale. RP 212-213. The state did not present any evidence regarding the registration or ownership of the other two guns. Mr. Oleson told police he knew there were guns in the house and that he knew he wasn't supposed to possess them. He also admitted that he and Christopher had used methamphetamine together the night before. RP 257.

Evidence introduced at trial suggested that Christopher owned the house. Ex. 6. No evidence indicated that Mr. Oleson had any ownership interest in the residence. A witness testified that (at the time of the search) that Mr. Oleson lived at least part time at another address. RP 480-511.

The court instructed the jury on the burden of proof and the definition of reasonable doubt. The court's instruction included the following language:

> A reasonable doubt is one for which a reason exists... If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.
> CP 52.

Mr. Oleson proposed instructions[6] defining "possession." CP 9, 10. The instructions included the following language:

> In deciding whether the defendant had dominion and control over a [substance/firearm], you are to consider all of the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the *immediate* ability to take actual possession of the [substance/firearm], whether the defendant had the capacity to exclude others from possession of the [substance/firearm] and whether the defendant had dominion and control over the premises where the [substance/firearm] was located. No single one of these factors necessarily controls your decision.
> CP 9, 10 (emphasis added).

The prosecutor advocated for an instruction that omitted the word "immediate." RP 559-561. The court's instructions did not include the word "immediate." CP 63, 69.

During her rebuttal closing, the prosecutor made the following argument:

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[6] One instruction referred to "having a substance in one's custody or control," the other referred to "a firearm." CP 9, 10.

> I mean, there's certainly things you don't know in this case. There's a back-story that you don't know.
> RP 601.

Mr. Oleson objected, and the court instructed jurors to "disregard the comment regarding a back-story." RP 601.

Mr. Oleson was acquitted of possessing one firearm. He was convicted of possessing the rifle and the pistol located in the fanny pack. RP 571; CP 72-73. He was also convicted of possessing methamphetamine. CP 72-73.

At sentencing, the court imposed 14 months and ordered Mr. Oleson to pay $100 toward the Kitsap County expert witness fund. CP 167, 171. Although the sentencing hearing included no discussion of Mr. Oleson's financial circumstances, the Judgment and Sentence included the following preprinted language: "The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations." CP 171.

The court ordered Mr. Oleson to pay a total of $4,635 in legal financial obligations (LFOs). CP 171. That same day, the court entered an Order of Indigency, authorizing Mr. Oleson to appeal his case at public expense. CP 176.

Mr. Oleson appealed. CP 178.

ARGUMENT

I. THE STATE DID NOT PROVE THAT MR. OLESON CONSTRUCTIVELY POSSESSED ANY GUNS OR DRUGS FOUND IN CHRISTOPHER'S HOUSE.

Constructive possession requires proof of dominion and control over an item or substance. *State v. Davis*, 182 Wn.2d 222, ___, 340 P.3d 820 (2014) (Stephens, J., for the majority) (emphasis added).[7] Here, the state failed to present proof of dominion and control over the guns or the drugs that police discovered in Sue Christopher's house.

Even when taken in a light most favorable to the state, the totality of the circumstances does not establish constructive possession. The state did not prove who owned either the guns[8] or the drugs. *Davis*, 182 Wn.2d at ___ (ownership relevant to constructive possession.) Nor did the state prove police found Mr. Oleson in close proximity to either the drugs or the guns. RP 235, 311; *Id.* (proximity relevant to constructive possession); *cf. State v. Chouinard*, 169 Wn. App. 895, 282 P.3d 117 (2012).

Mr. Oleson did not own the house. Ex. 6; *Id.* (ownership of premises relevant to constructive possession in some cases). Christopher,

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[7] Although characterized as a dissent, Justice Stephens' opinion was joined by four other justices on the issue of constructive possession, and thus is the court's holding on that issue. *Id.* The lead opinion did not garner a majority on the issue of constructive possession. *See Davis*, 182 Wn.2d at ___ ("This opinion, which has four votes, would hold that the State presented sufficient evidence to support the firearm possession convictions. However, that is not the opinion of the majority.")

[8] One gun was registered to a third party, who had no connection to the case. RP 212-213.

who did own the house, shared it with at least one other person besides Mr. Oleson, and nothing showed that Mr. Oleson had even partial dominion and control over the areas where the guns and drugs were found. RP 219-224, 356; *Id.*[9] Finally, one of the guns was at least partially concealed in a fanny pack that had no apparent connection to Mr. Oleson; thus, there is no indication that he even knew that particular gun was there.[10] RP 190, 195.

The state failed to prove constructive possession.[11] *Davis*, 182 Wn.2d at ___. Accordingly, Mr. Oleson's convictions must be reversed and the charges dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

II. THE COURT'S INSTRUCTIONS ALLOWED CONVICTION EVEN IF MR. OLESON DID NOT HAVE DOMINION AND CONTROL.

Constructive possession requires proof that the accused person has "the ability to *immediately* take actual possession of an item." *Davis*, 182 Wn.2d at ___ (Stephens, J. for the majority) (emphasis added).[12] Over

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[9] *See also State v. Weiss*, 73 Wn.2d 372, 375, 438 P.2d 610 (1968) (dominion and control over premises requires more than "residing").

[10] Mr. Oleson was acquitted of possessing the third gun, which was found in a safe. CP 72-73.

[11] The state's burden is to prove the elements of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

[12] As noted above, Justice Stephens "dissent" is the majority opinion on the issue of constructive possession. *Id.*

defense objection,[13] the court omitted the immediacy requirement from its instructions defining possession. CP 63, 69.[14]

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).[15] The court's instructions did not make the standard manifestly clear, because they allowed conviction even if Mr. Oleson did not have the immediate ability to take actual possession. CP 63, 69.

The state cannot show harmlessness beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341. The erroneous instruction went to the heart of the case: at trial, Mr. Oleson argued that he did not possess either the guns or the drugs. RP 582-594. The state's evidence on constructive possession[16] was minimal at best.[17] Nothing showed that he had the immediate ability to take actual control of either the drugs or the guns. RP 235, 311.

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[13] CP 9, 10, 15, 16; RP 559.

[14] The prosecutor noted that the word "immediate" is bracketed in the pattern instruction. WPIC 50.03. The comment to WPIC 50.03 lists some cases defining constructive possession using the word "immediate," and others which do not use that word. All of the cases predate *Davis*. Mr. Oleson's trial also occurred prior to *Davis*.

[15] An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. U.S. Const. Amend. XIV; *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

[16] The state did not present any evidence suggesting actual possession.

[17] Mr. Oleson argues insufficient evidence elsewhere in this brief.

By omitting the immediacy element, the court's instructions misled the jury and prejudiced Mr. Oleson. Had the court instructed the jury properly, it is possible that some jurors would have concluded he possessed neither the drugs nor the guns.

Mr. Oleson's convictions must be reversed. *Kyllo*, 166 Wn.2d at 864. The charges must be remanded for a new trial with proper instructions. *Id.*

III. THE CHARGING DOCUMENT FAILED TO ALLEGE CRITICAL FACTS ALLOWING MR. OLESON TO PLEAD THE INFORMATION AS A BAR TO SUBSEQUENT PROSECUTION FOR EACH FIREARM CHARGE.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

B. The Information failed to allege facts sufficient to allow him to argue an acquittal or conviction as a bar against a second prosecution for the same crime.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.[18] A charging document "is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).[19] The charge must include more than "the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction "in case any other proceedings are taken against him for a similar offense." *Id.* Any "critical facts must be found within the four corners of the charging

[18] Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

[19] The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amends. V, XIV.

document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).[20]

In this case, the Information passes only the first of the three requirements: it charges in the language of the statute, and thus "contains the elements of the offense intended to be charged." *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.; Valentine,* 395 F.3d at 631.

Here, the Information does not provide information identifying or differentiating between any of the three firearms Mr. Oleson allegedly possessed. CP 42-44. Because of this, the allegations are "too vague and indefinite upon which to deprive [Mr. Oleson] of his liberty." *Id.*

The Information provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine,* 395 F.3d at 631. The critical facts in Mr. Oleson's cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

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[20] For example, in theft cases, the Information must "clearly" identify "specifically described property." *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes "not a single word to indicate the nature, character, or value of the property," the charge is "too vague and indefinite upon which to deprive one of his [or her] liberty." *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

The Information is constitutionally deficient. *Id.* Mr. Oleson's two UPF convictions must be reversed, and the charges dismissed without prejudice. *Id.*, at 893.

IV. MR. OLESON WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR TOLD JURORS "THERE'S CERTAINLY THINGS YOU DON'T KNOW," BECAUSE THE JURY HADN'T HEARD THE "BACK-STORY" OF THE CASE.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight. *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by urging a jury to consider "facts" that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at705; *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stith,* 71 Wn. App. 14, 856 P.2d 415 (1993).

It is misconduct to "suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); *see also State v.*

Martin, 69 Wn. App. 686, 849 P.2d 1289 (1993). In this case, the prosecutor did just that.

By telling jurors "there's certainly things you don't know in this case," the prosecutor hinted at incriminating evidence withheld from the jury. RP 601. The prosecutor improperly expanded this hint into "a back-story you don't know." RP 601. These improper statements strongly suggested that additional evidence supported conviction.

Here, the prosecutor's misconduct was designed to prejudice Mr. Oleson. Not only did the misconduct imply the existence of additional incriminating evidence, it hinted that the defense had somehow contrived to keep the jury from hearing the full story. Given the "fact-finding facilities presumably available"[21] to the prosecutor's office, the jury likely came away believing that even more evidence than that which the state presented at trial established Mr. Oleson's guilt.

These arguments were wholly improper. *Glasmann*, 175 Wn. 2d at 705. Rather than arguing that the evidence supported conviction, the prosecutor chose to rely on matters outside the record. RP 601.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*,

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[21] *See* Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Here, there is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Oleson's trial.[22] *Glasmann*, 175 Wn.2d at 704. The prosecutor's remark, hinting at the existence of additional evidence, likely influenced jurors on a subconscious level, infecting them with the idea that they hadn't heard the whole truth.

Although the court told jurors to "disregard the comment regarding a back-story," this instruction did not cure the prejudice. RP 601. Despite the court's effort to mitigate the prejudice, the prosecutor's misconduct was, like the proverbial bell, "hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). Indeed, there is a likelihood that the objection and curative instruction served to highlight the prosecutor's suggestion that other evidence supported conviction, and thus did "more harm than good." *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging jurors to convict based on matters outside the

[22] Indeed, the misconduct qualified as flagrant and ill-intentioned and thus would require reversal even absent objection, since it violated professional standards and case law that were available to the prosecutor when she committed it. *Glasmann*, 175 Wn.2d at 707.

record. *Glasmann*, 175 Wn. 2d at 705, 707. Mr. Oleson's convictions must be reversed. *Id.*

V. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. OLESON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge*." CP 52 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 52.[23]

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757

[23] Mr. Oleson does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Oleson objects to the instruction's focus on "the truth." CP 52.

(citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 52.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery.* The problem here is greater than that presented in *Emery.* In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 52. Jurors were obligated to follow the instruction. CP 52.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[24] *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of

[24] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

proof, confused the jury's role, and denied Mr. Oleson his constitutional right to a jury trial.[25]

Mr. Oleson's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

B. The instruction diverted the jury's attention away from the reasonableness of any doubt, and erroneously focused it on whether jurors could provide a reason for any doubts.

1. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan,* 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor*, 511 U.S. at 5-6).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S.at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan,* 508 U.S.at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759-60 (addressing prosecutorial

[25] U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is "inappropriate" because it "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 759-60.[26]

Requiring articulation "skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit..." *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc,* 138 F.3d 552 (5th Cir. 1998).[27] An instruction imposing an articulation requirement "creates a lower standard of proof than due process requires." *Id.*, at 534.[28]

2. The trial court erroneously told jurors to convict unless they had a doubt "for which a reason exists."

The trial court instructed jurors that "A reasonable doubt is one for which a reason exists." CP 52. This suggested to the jury that it could not acquit unless it could find a doubt "for which a reason exists." CP 52.

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[26] *See also State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn. 2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011).

[27] The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA's strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

[28] In *Humphrey,* the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as "a serious doubt, for which you can give a good reason." *Humphrey,* 120 F.3d at 530.

This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A "reasonable doubt" is not the same as a reason to doubt. "Reasonable" means "being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous. . . being or remaining within the bounds of reason... Rational." *Webster's Third New Int'l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia,* 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); *Johnson v. Louisiana,* 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The "a" before "reason" in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 52. "[A] reason" is "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary.* The phrase "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more

than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.") Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.[29]For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3. CP 52.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors had no choice but to deliberate with the understanding that acquittal required a reason for any doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof

[29]See Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

than due process requires..." *Humphrey,* 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court's instruction violated Mr. Oleson's right to due process and his right to a jury trial. *Id.; Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

VI. THE COURT SHOULD NOT HAVE ORDERED MR. OLESON TO PAY $4,635 IN LEGAL FINANCIAL OBLIGATIONS.

A. Standard of Review.

Reviewing courts assess questions of law *de novo. State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013); *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This includes errors based on a sentencing court's failure to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[30]

[30] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App.

B. The court exceeded its statutory authority by ordering Mr. Oleson to pay $100 into an "expert witness fund."

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[31] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. *Id.*; RCW 9.94A.760.

The court exceeded its authority by ordering Mr. Oleson to pay $100 into the Kitsap County expert witness fund. No statute authorizes imposition of such costs.

The $100 assessment for the expert witness fund must be vacated. *Hathaway*, 161 Wn. App. at 651-653. Mr. Oleson's case remanded for correction of the judgment and sentence. *Id.*

C. The trial court erred by ordering Mr. Oleson to pay $4,635 in legal financial obligations without inquiring into his ability to pay them.

The court appointed a public defender at the start of Mr. Oleson's case. Order Appointing Attorney, Supp. CP. Mr. Oleson was found indigent at sentencing. CP 176.

873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

[31] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

Despite these findings, the court ordered Mr. Oleson to pay $4,635 in legal financial obligations (LFOs). CP 171. The court relied on preprinted boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 171. The court did not conduct any particularized inquiry into Mr. Oleson's financial situation at sentencing. *See* RP (10/17/14). The court erred by ordering Mr. Oleson to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Oleson's ability to pay LFOs. RP (10/17/14). The court did not consider

his financial status in any way. RP (10/17/14). Indeed, the court also found Mr. Oleson indigent on the same day that it imposed $4,635 in LFOs. CP 171, 176.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Oleson's incarceration and indigent status would have weighed heavily against a finding that he had the ability to pay the amount imposed.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, --- Wn.2d at ---, 344 P.3d at 683. The *Blazina* court recently chose to review the exact LFO-related issue raised in Mr. Oleson's case, finding that "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should

follow the Supreme Court's lead and consider the merits of Mr. Oleson's LFO claim even though it was not raised below.

The court erred by ordering Mr. Oleson to pay $4,635 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn.2d at ---, 344 P.3d at 685. This case must be remanded for a new sentencing hearing. *Id.*

CONCLUSION

Mr. Oleson's convictions must be reversed and the charges dismissed with prejudice. The evidence was insufficient to sustain his convictions.

In the alternative, the case must be remanded for a new trial. The court's instructions defining possession misstated the law and allowed conviction without proof of that element. In addition, the court's "reasonable doubt" instruction included an articulation requirement and focused the jury's attention on a search for the truth.

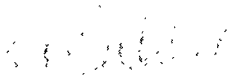
Furthermore, the prosecutor's misconduct required reversal, because the court's curative instruction did not eliminate the prejudice. Finally, the firearm charges must be dismissed without prejudice. The charging language failed to include critical facts sufficient to allow Mr.

Oleson to plead the Information as a bar to subsequent prosecution for the same offense.

If the convictions are not reversed, the court's order to pay $100 to the Kitsap County expert witness fund must be vacated. The payment is not authorized by statute. In addition, the court improperly imposed $4,635 in LFOs without considering whether or not Mr. Oleson will ever have the ability to pay this amount. This portion of the sentence must be vacated and the case remanded for a hearing on the LFO issue.

Respectfully submitted on April 22, 2015,

BACKLUND AND MISTRY



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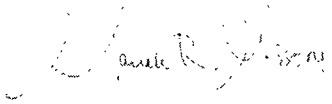

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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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I mailed the Appellant's Opening Brief to the Court of Appeals, Division II.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 22, 2015.

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